

BEFORE THE DEPARTMENT OF ADMINISTRATION  
OF THE STATE OF MONTANA

In the matter of the adoption of New	)	NOTICE OF PUBLIC HEARING ON
Rules I through V, the amendment of	)	PROPOSED ADOPTION,
ARM 2.21.6606, 2.21.6608, 2.21.6622,	)	AMENDMENT, AND AMENDMENT
and the amendment and transfer of	)	AND TRANSFER
ARM 2.21.6611 pertaining to employee	)	
records management	)	

TO: All Concerned Persons

1. On March 11, 2010, at 11:00 a.m., the Department of Administration will hold a public hearing in Room 136 of the Mitchell Building, at 125 N. Roberts, Helena, Montana, to consider the proposed adoption, amendment, and amendment and transfer of the above-stated rules.

2. The Department of Administration will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Administration no later than 5:00 p.m. on March 1, 2010, to advise us of the nature of the accommodation needed. Please contact Lisa Coligan, Department of Administration, P.O. Box 200127, 125 N Roberts Street, Helena, Montana 59620; telephone (406) 444-3854; fax (406) 444-0703; Montana Relay Service 711; or e-mail lcoligan@mt.gov.

3. The rules proposed to be adopted provide as follows:

NEW RULE I RECORDS THAT CONSITUTE EMPLOYEE PERSONNEL RECORDS (1) Employee personnel records, both electronic and paper, include:

- (a) preemployment information (resumes, references, interview questions, etc.);
  - (b) compensation, job history, and timekeeping records;
  - (c) employee accident reports and worker's compensation claims;
  - (d) I-9 forms;
  - (e) W-4 forms;
  - (f) benefit plans and employee medical records (including disability accommodation requests and supporting documents, and any record that contains genetic information);
  - (g) performance appraisals;
  - (h) disciplinary action records;
  - (i) background check information;
  - (j) office policies/documents signed by the employee; and
  - (k) awards and acknowledgements.
- (2) Employee personnel records do not include documents, information, or other evidence developed as part of an investigation. If an investigation results in disciplinary action, the disciplinary action record is an employee personnel record.

Investigations include, but are not limited to, grievances, violations of agency rules, policies, and procedures, or matters that may result in civil or criminal liability.

AUTH: 2-18-102, MCA

IMP: 2-18-102, MCA

STATEMENT OF REASONABLE NECESSITY: The Department of Administration proposes to adopt New Rule I to add content that is missing from the current Employee Records Management policy. The current policy describes access restrictions for employee personnel records, but does not describe what types of records constitute employee personnel records. Section (2) above is included under Access to Employee Personnel Records in the current policy. The Department of Administration proposes moving it to New Rule I for clarity and organization.

NEW RULE II RECORDS THAT CONTAIN GENETIC INFORMATION

(1) The federal Genetic Information Nondiscrimination Act (GINA) provides that the following records contain genetic information:

- (a) an individual's genetic tests, including genetic tests done as part of a research study;
- (b) genetic tests of an individual's family members;
- (c) genetic tests of any fetus of an individual or family member who is a pregnant woman, and genetic tests of any embryo legally held by an individual or family member utilizing assisted reproductive technology;
- (d) an individual's family medical history; and
- (e) any request for, or receipt of, genetic services or participation in clinical research that includes genetic services (genetic testing, counseling, or education).

(2) Examples of frequently used employee personnel records that may contain genetic information include Family and Medical Leave Act (FMLA) request forms, reasonable accommodation requests, medical certification tests, medically fit for duty forms, and records relating to worker's compensation claims.

AUTH: 2-18-102, MCA

IMP: 2-18-102, MCA

STATEMENT OF REASONABLE NECESSITY: The Department of Administration proposes New Rule II to define which types of records contain and may contain genetic information. GINA is a new federal act establishing storage and access requirements for employee personnel and other records that contain genetic information.

NEW RULE III EMPLOYEE PERSONNEL RECORDS STORAGE

- (1) Agencies shall store employee personnel records as follows:
  - (a) I-9 forms for all employees may be stored together, but must be kept separate from other records in a secured area such as a locked cabinet or drawer;
  - (b) employee background check information must also be maintained separate from other records in a secure location such as a locked cabinet or drawer;

(c) an employee's medical and genetic information may be kept in the same folder, but these folders must be stored and secured in separate locked cabinets or drawers from other personnel records as required by the Americans with Disabilities Act (ADA) and GINA;

(d) all other employee personnel records, such as performance appraisals and preemployment information, must be stored in the employee's personnel file. These files must be stored in a secure location, such as locked cabinet or drawer separate from other records; and

(e) electronic employee personnel records must be stored in secure electronic folders and must be separated in electronic folders as outlined in this rule.

AUTH: 2-18-102, MCA

IMP: 2-18-102, MCA

STATEMENT OF REASONABLE NECESSITY: The Department of Administration proposes New Rule III to add content that is missing from the current Employee Records Management policy. The current policy states that access to employee personnel records must be restricted, but the policy does not include federal requirements describing how these records must be stored to ensure that access to them is restricted.

NEW RULE IV EMPLOYEE PERSONNEL RECORDS USE (1) Nothing in this subchapter prohibits authorized users from relying on the content of employee personnel records as provided in this policy or in agency procedures when responding to requests for employment information from employers to which employees have applied for employment.

(2) Agencies may set and charge fees for copies of employee personnel records.

AUTH: 2-18-102, MCA

IMP: 2-18-102, MCA

STATEMENT OF REASONABLE NECESSITY: The Department of Administration proposes New Rule IV for organization and clarity. The above rule is in the Access to Employee Personnel Records section of the current policy. The above rule deals with employee personnel records use, not employee personnel records access. Thus, the Department of Administration proposes moving this portion of the rule to a new rule that outlines employee personnel records use.

NEW RULE V EMPLOYEE PERSONNEL RECORDS RETENTION (1) The Montana Secretary of State's Records and Information Management Division maintains a records retention schedule for payroll and personnel records. Most employee personnel records must be kept in the employer's office for three years after an employee terminates employment, and then transferred to the state records center for seven additional years. Some personnel records have different retention requirements, which are listed in the schedule.

(2) The GS5 payroll and personnel records schedule may be accessed via the Secretary of State's web site.

AUTH: 2-18-102, MCA

IMP: 2-18-102, MCA

STATEMENT OF REASONABLE NECESSITY: The Department of Administration proposes New Rule V to add content that is missing from the current Employee Records Management policy. The current policy addresses records access, but does not inform agencies how long employee personnel records must be retained and where the records are stored.

4. The rules proposed to be amended provide as follows, new matter underlined, deleted matter interlined:

2.21.6606 POLICY AND OBJECTIVES (1) ~~It is the policy of the state of Montana to:~~ This policy:

(a) defines which records constitute employee records and establishes procedures for collecting and maintaining employee personnel records while protecting an employee's right of privacy pursuant to under Article II, section 10 of the constitution of the State of Montana; and Montana's constitution;

(b) ensures employee awareness of records held, provides employees access to their personnel records, and ~~allow agencies to correct~~ describes how employee personnel records may be corrected;

(2) ~~(c) It is the objective of this policy to~~ provides minimum standards for employee records management and allows agencies to adopt supplemental employee records management procedures; and

(d) covers all positions in Montana's executive branch except elected officials, the personal staff of elected officials, those employed by the Montana University System and the Montana State Fund, and any other position specifically excluded under 2-18-103 and 2-18-104, MCA.

AUTH: 2-18-102, MCA

IMP: 2-18-102, MCA

2.21.6608 DEFINITIONS As used in this subchapter the following definitions apply:

(1) remains the same.

~~(2) "Agency" has the same meaning as defined in 2-18-101(1), MCA.~~

(3) remains the same, but is renumbered (2).

~~(4) "Document" means an object upon which information is written, transcribed or recorded.~~

~~(5)~~ (3) "Employee personnel record" means information relating to an employee's employment with the state of Montana that is appropriate for preservation as an official record of employment policies, practices, and decisions. An employee personnel record may be a paper document or it may be information maintained in an information system such as the Statewide Accounting Budgeting

and Human Resource System (SABHRS). Employee personnel records include the documents listed in [New Rule I]. ~~Other programs including, but not limited to, Montana Public Employee Retirement Administration (MPERA), workers' compensation, or unemployment insurance, develop records relating to an employee which are not an employee personnel record as defined in this policy.~~

~~(6) "Statewide Accounting Budgeting and Human Resource System (SABHRS)" means the automated system established by the state of Montana to maintain some types of personnel records for state employees.~~

(4) "Genetic information" means information about applicants' or employees' genetic tests, the genetic tests of their family members, and the manifestation of a disease or disorder in their family members. Genetic information does not include information about an individual's sex or age. Records containing genetic information are listed in [New Rule II].

(5) "Genetic test" means an analysis of human DNA, RNA, chromosomes, proteins, or metabolites that detects genotypes, mutations, or chromosomal changes.

(7) remains the same, but is renumbered (6).

AUTH: 2-18-102, MCA

IMP: 2-18-102, MCA

2.21.6622 CLOSING (1) This subchapter shall be followed unless it conflicts with negotiated labor ~~contracts~~ agreements or specific statutes, which shall ~~take~~ precedence govern to the extent applicable.

AUTH: 2-18-102, MCA

IMP: 2-18-102, MCA

STATEMENT OF REASONABLE NECESSITY: The Department of Administration proposes to amend ARM 2.21.6606, 2.21.6608, and 2.21.6622 to improve writing style and clarity and to remove definitions that are not pertinent to or mentioned in the Employee Records Management policy. The Department of Administration also proposes amendments to ARM 2.21.6608 to add and explain new definitions relating to GINA.

5. The rule proposed to be amended and transferred provides as follows, new matter underlined, deleted matter interlined:

2.21.6611 (2.21.6615) ACCESS TO EMPLOYEE PERSONNEL RECORDS

(1) All employee personnel records are confidential and access is restricted to protect individual employee privacy, except the following employee information which is considered public and must be released upon request:

(a) an employee's name;

(b) position title;

(c) dates and duration of employment;

(d) salary; and

(e) claims for vacation, holiday, or sick leave pay, except that the reason for taking leave is confidential and may not be disclosed which are public information and must be released on request.

(2) An agency Agencies may require that the a request for information be in writing. An agency Agencies may not require justification for the a request.

(2) An agency must restrict access to confidential records to protect individual employee privacy.

(3) In addition to access provided in this subchapter and an agency procedure, the following provisions apply to employee personnel records:

(a) (3) The An employee has access to all of his or her employee personnel records. An employee may file a written response to information contained in the employee's personnel records which becomes a permanent part of the record. The employee's response must be filed within ten working days of the date on which an the employee is made aware of the information by the agency. The written response becomes a permanent part of the employee's personnel record.

(b) (4) Information collected regarding medical examinations or inquiries must be treated as confidential medical records in compliance with the Americans with Disabilities Act (ADA) and collected and maintained on separate forms in separate files from employee personnel records. As provided in the ADA and FMLA, access is restricted to medical information may not be disclosed except to:

(i) remains the same, but is renumbered (a).

(ii) (b) first aid and safety personnel, when appropriate, if the disability might require emergency treatment; and

(iii) (c) on request from government officials investigating compliance with the ADA or FMLA; and-

(d) support an employee's compliance with the certification provisions of the FMLA.

(c) Nothing in this rule prohibits those having authorized access to employee personnel records as provided in this rule or in any agency procedures from relying on the content of those records when responding to a request for employment information from organizations to which the employee has applied for employment.

(5) As provided in GINA, genetic information may not be disclosed except:

(a) to an occupational or other health researcher if the research is conducted in compliance with the federal regulations and protections provided for under the Protection of Human Subjects, 45 CFR, Part 46;

(b) in response to a court order, but only the genetic information expressly authorized by the court order may be disclosed and the employee must be informed before the disclosure;

(c) to government officials investigating compliance with GINA;

(d) to support an employee's compliance with the certification provisions of the FMLA; and

(e) to a federal, state, or local public health agency only regarding information about the manifestation of a contagious disease that presents an imminent hazard of death or life-threatening illness, and the employee must be notified before the disclosure.

~~(d)~~ (6) The ~~Office of the~~ Legislative Auditor's Division has access to employee personnel records pursuant to under 5-13-309, MCA, for the purposes of auditing state agencies.

~~(e)~~ (7) The Human Rights ~~Commission~~ Bureau, Department of Labor and Industry, has access to employee personnel records directly related to discrimination complaints of ~~discrimination~~.

~~(f)~~ (8) The professional staff of the State ~~Personnel~~ Human Resources Division has access to confidential records when gathering summary data on personnel programs or systems or ~~to provide~~ when providing technical assistance ~~at the request of to~~ an agency.

~~(g)~~ Employee personnel records, as defined in this policy, do not include documents, information, or other evidence developed as part of an investigation. Investigations may include, but are not limited to, grievance investigations, violation of agency rules, policies, and procedures, or matters which may result in civil or criminal prosecution. Access to such documents will be determined on a case-by-case basis, balancing the constitutional guarantees of The Right to Privacy, Article II, section 10, and The Public's Right to Know, Article II, section 9.

~~(h)~~ (9) Certain governmental entities have authority pursuant to under state or federal law to access an employee's personnel record.

~~(i)~~ (10) Other persons may access an employee's personnel record only if there is a job-related purpose, the employee has granted written permission, or pursuant to if a valid court order grants access. An agency ~~will shall~~ inform ~~an the~~ employee when a valid court order has been received directing access ~~be provided~~ to an employee's personnel record.

~~(j)~~ Fees may be charged to copy employee personnel records.

AUTH: 2-18-102, MCA

IMP: 2-18-102, MCA

STATEMENT OF REASONABLE NECESSITY: The Department of Administration proposes to amend ARM 2.21.6611 to comply with the new federal requirements of GINA. This federal act requires specific treatment of confidential medical records that contain genetic information. The Department of Administration proposes transferring ARM 2.21.6611 to 2.21.6615 for clarity and organization. Transferring this rule allows the types of records that constitute employee personnel records to be defined before the access requirements are outlined. The Department of Administration recommends, organizationally, that the rule that describes what these records are should be listed before the rule that defines how these records are accessed. Other changes are being proposed improve the clarity of the rule.

6. Concerned persons may submit their data, views, or arguments concerning the proposed action in writing to Lisa Coligan, Department of Administration, P.O. Box 200127, Helena, Montana 59620; telephone (406) 444-3854; fax (406) 444-0703; or e-mail lcoligan@mt.gov, and must be received no later than 5:00 p.m., March 12, 2010.

7. Lisa Coligan, Department of Administration, has been designated to preside over and conduct this hearing.

8. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this department. Persons who wish to have their name added to the mailing list shall make a written request which includes the name and mailing address or e-mail address of the person to receive notices and specifies that the person wishes to receive notices regarding State Human Resources Division rulemaking actions. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 6 above or may be made by completing a request form at any rules hearing held by the department.

9. An electronic copy of this Proposal Notice is available through the department's web site at <http://doa.mt.gov/administrativerules.mcp>x. The department strives to make the electronic copy of the notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that if a discrepancy exists between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the department works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

10. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

By: /s/ Janet R. Kelly  
Janet R. Kelly, Director  
Department of Administration

By: /s/ Michael P. Manion  
Michael P. Manion, Rule Reviewer  
Department of Administration

Certified to the Secretary of State February 1, 2010.